SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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LATASHA MARBURY,

Plaintiff, Index No.: 59532/2011

-against-

CHAUCER SYNDICATES, LTD., THE CCL PARTNERSHIP, LLP, ARGENTA HOLDINGS, PLC, LIBERTY SYNDICATES, TALBOT UNDERWRITING, LTD, AON RISK SERVICES NORTHEAST, INC., NAVIGATORS INSURANCE COMPANY, AON, LTD. and DAVID SHIMUNOV,

Justice Sam D. Walker

Defendants.

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CHAUCER SYNDICATES, LTD., THE CCL PARTNERSHIP, LLP, ARGENTA HOLDINGS, PLC, LIBERTY SYNDICATES, TALBOT UNDERWRITING, LTD, and NAVIGATORS INSURANCE COMPANY,

Third-Party Plaintiffs,

-against- Index No.: 59532/2011T

DAVID SHIMUNOV,

Third-Party Defendant.

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REPLY MEMORANDUM OF LAW IN SUPPORT OF THE UNDERWRITING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Jonathan S. Chernow, Esq.
Laura R. Fleischner, Esq.
Of Counsel

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Preliminary Statement

Plaintiff's Opposition to the Underwriting Defendants' motion for summary judgment is "smoke and mirrors" rather than legal argument. Unable to salvage the undisputed material fact that Exclusion B in the Underwriting Defendants' policy bars recovery because Ms. Marbury was neither wearing nor carrying the jewelry at issue under her personal supervision at the time of its alleged loss, Plaintiff resorts to convoluted and off base attempts to find supposed ambiguities in the policy to support a theory that Mr. Shimanov set out, on May 24, 2011, with a pre-conceived plan to rob Ms. Marbury of her jewelry. However, the supposed ambiguities do not exist and neither does proof of Mr. Shimanov's alleged larcenous intent at the moment of the consignment. Accordingly, this Court should grant the Underwriting Defendants' motion for summary judgment and deny Plaintiff's request to find summary judgment for Ms. Marbury.

I. NO COVERED LOSS OCCURRED WHILE MS. MARBURY WAS EITHER WEARING OR CARRYING THE JEWELRY AT ISSUE.

Plaintiff seeks to fit Ms. Marbury's alleged loss within either paragraph (i) or (ii) of Exclusion B by arguing that Mr. Shimanov tricked her into the consignment and intended to steal her jewelry at the moment she relinquished possession of the items. However, Ms. Marbury failed to provide any evidence during discovery demonstrating that Mr. Shimanov lured her into the consignment with false promises or intended to steal the jewelry when she bailed the items to him. Thus, the Underwriting Defendants' denial of Plaintiff's claim on the basis of Exclusion B was proper.[1]

[1] Plaintiff cites *Wright v. Evanston Ins. Co.*, 14 A.D.3d 505, 788 N.Y.S.2d 416 (2d Dept. 2005) for the proposition that policies of insurance should not be construed to render coverage illusory. While the Underwriting Defendants do not contest this tenant of construction, *Wright* concerned whether the insurer was obligated to indemnify its insured in a personal injury and wrongful death action and thus is inapposite. Plaintiffs have also not presented any proof that they specifically paid "additional premium" to the Underwriting Defendants for any of the coverages in the Policy, as the plaintiff in *Wright* did. *Id.*, at 506.

A. Plaintiff's Argument That Shimanov Stole Her Jewelry Through Trick, False Pretense Or False Promise Is Not Based On Any Evidence.

Plaintiff's claim that she is entitled to the full scheduled value of her yellow diamond jewelry is predicated on the assumption that Mr. Shimanov intended to steal the jewelry as she handed the items to him. However, because Ms. Marbury has failed to prove that Mr. Shimanov intended to steal her jewelry at that moment of transfer, any claim that Exclusion B could possibly cover her alleged loss must fail.

In *Zimring v. English & American Ins. Co. et al.*, 91 A.D.2d 889, 457 N.Y.S.2d 504 (1st Dept. 1983),[2] the First Department found there was no coverage for a theft that occurred when the insured jewelry was in the trunk of a car, and not under the insured's personal supervision. There, the theft would only have been covered if it occurred while the insured property was "in the hands of or under the personal supervision of the assured or a member of the family of the assured."

Further, it is well settled under New York State Penal Law 155.05 (1) that the "intent to deprive another of property or to appropriate the same" element of larceny "connote[s] a purpose… to exert permanent or virtually permanent control over the property taken, or to cause permanent or virtually permanent loss to the owner of the possession and use thereof." [citation omitted] *People v. Jennings*, 69 N.Y. 2d 103, 118, 504 N.E. 2d 1079, 512 N.Y.S. 2d 652 (1986).

Proof of "larceny by trick," 155.05 (2)(a), *supra*, depends upon obtaining "possession of (but not title) to property by the wrongdoer's false statements," but requires that the false statement by a "material" one "about a past or presently existing fact." *People v. Norman*, 85 N.Y. 2d 609, 618, n. 3 and 619, 650 N.E. 2d 1303, 627 N.Y.S. 2d 302 (1995). Similarly, larceny

[2] Underwriting Defendants cited this case in the Memorandum of Law in Support of their Motion for Summary Judgment ("Initial Memo of Law"). Plaintiff did not distinguish this case – or any case cited by Underwriting Defendants – in its Affirmation in Opposition.

by false pretenses, *id.*, is established by showing, *inter alia,* "that a defendant had a criminal intent to deprive an owner of his property, that he made a false representation of a past or existing fact, that he knew the representation was false…The wrongdoer's misrepresentation must relate to a past or present fact, not a future intention." *People v. Avino*, 34 A.D. 3d 1251, 1252, 826 N.Y.S. 2d 860 (4th Dept. 2006). As for "larceny by false promise," NYPL 155.05(2)(d), proof of this crime "is limited to situations in which an individual has made a promise while harboring a present intention not to perform." *People v. Norman*, *supra*, at 619. Consequently, the bar to conviction for false promise is not met by "mere failure to pay…debts or an inability to perform contractual obligations," *People v. Churchill*, 47 N.Y. 2d 151, 157, 390 N.E. 2d 1146, 417 N.Y.S. 2d 221 (1979), or for "overextended" businessmen who are unable to meet their "financial obligations." *People v. Ryan*, 41 N.Y. 2d 634, 642, 363 N.E. 2d 334, 394 N.Y.S. 2d 609 (1977).

Based on the above law, there is insufficient proof that Shimanov gained possession of Ms. Marbury's jewelry through either larceny by trick, false pretenses, or false promise.

Mr. Shimanov testified that he never told Ms. Marbury that a potential buyer from Russia was in town as she has claimed (See Chernow Affirmation in Support dated November 11, 2013 [hereinafter "Chernow Aff."] at Ex. "R" p. 101, lines 15-17, and see Ex. "I" to the Chernow Reply Affirmation dated February 19, 2014 [hereinafter "Reply Aff."] at p. 262, line 23 through p. 264, line 21). Thus, there is insufficient evidence that a material false statement of present or existing fact was made by Mr. Shimanov. Further, Mr. Shimanov testified that he did not intend to steal the jewelry when Ms. Marbury relinquished possession to him (Reply Aff, Ex. "I," p. 284, lines 4-10, page 285, lines 6-11). Thus, there is insufficient evidence that Mr. Shimanov harbored the intent to permanently deprive Ms. Marbury of her property on May 24, 2011.

Moreover, the Court should take judicial notice of the fact that Mr. Shimanov was never convicted, let alone arrested, for the alleged theft and/or larceny of the jewelry from Ms. Marbury. In fact, the New York City Police Department report relating to the alleged theft was voided because the police determined it to be a civil, and not a criminal matter. (See Chernow Aff. at Ex. "Q," pp. 2-3, sub-Exhibit 2 at RMG00034-35 and see Reply Aff. At Ex. "E," p. 356, lines 2-10). In other words, this is not a case where there is an admission of liability of larceny via a guilty plea, *see Employers Mutual Liab. Ins. Co. v. Jack Schectman et. al,* 56 A.D. 2d 520, 391 N.Y.S. 2d 117 (1st Dept. 1977), or where the police determined an item of property was stolen so that a policy provision ensuring against theft or larceny applied, *see Lapidus v. GEICO*, 57 Misc. 2d 649, 650, 293 N.Y.S. 2d 174 (Civil Ct, Special Term Queens Cty. 1968); [police told insured that car he bought was stolen].

Based on the above, Ms. Marbury cannot prove Mr. Shimanov intended to steal her jewelry the moment she entrusted it to him. Rather, the fact pattern presented here is similar to *Zurich Am. Ins. Co. v. Grimberg Fine Art*, 2008 U.S. Dist. LEXIS 10544 (S.D.N.Y. Feb. 11, 2008), *aff'd*, 324 Fed. Appx. 117, 2009 U.S. App. LEXIS 9937 (2d Cir. 2009).

In *Grimberg*, the Court found that art dealer Michel Cohen had not stolen a painting from Felipe Grimberg as part of a criminal scheme or trick. Grimberg argued that Cohen intended to steal or defraud him of the painting even before it was delivered to Cohen and argued that the delivery was procured by fraud or theft. The court disagreed, finding that plaintiffs in cases cited by Grimberg "were defrauded of their property. In contrast, Grimberg assumed the risk of non-payment through his informal dealings with Cohen." The court elaborated that whatever fraud that occurred between Grimberg and Cohen occurred after the delivery of painting. "The fact that the parties had been working together since the 1980s, and that Grimberg did not think there was necessarily anything amiss when he did not receive the payment immediately from Cohen for [the painting], indicates that it was not unusual for the parties to conduct business in this way." *See also Sutro Bros. & Co. v. Indem. Ins. of N. Am.*, 264 F. Supp. 273 (S.D.N.Y. 1967), *aff'd*, 386 F.2d 798 (2d Cir. 1967) (insurer not liable to insured who sold and delivered securities to a long term customer while failing to get certificates of payment, as the insured "was not tricked out of possession but surrendered the securities in accordance with practice long followed…[T]he risk of non-payment was assumed…").

Likewise here, Plaintiff assumed the risk of consignment without a written agreement, and this had been the practice with Plaintiff and Mr. Shimanov in other transactions. Ms. Marbury admitted that a formal consignment agreement was not discussed with Mr. Shimanov (Exhibit "R" to Chernow Aff. at p. 101, lines 8-11) and stated that she never asked Mr. Shimanov to give her a memorandum or receipt confirming delivery of the earrings and pendant (Reply Aff. at Ex. "K," p. 440, at lines 15-19). Ms. Marbury also testified that she had previously delivered a watch to Mr. Shimanov to sell without a written consignment agreement, which he subsequently returned when he could not find a buyer. (Reply Aff. at Ex. "D," p. 92, lines 14-25, pp. 93-94 and p. 95, lines 2-13) [a second watch was also consigned, *see* Reply Aff. at Ex. "K" p. 448, at lines 16-24)]. Indeed, Ms. Marbury initially could not recall the number of times she gave the earrings and pendant to Mr. Shimanov in this fashion, (*Id.* at p. 440 at lines 4-7), ultimately testifying that it was between one and three times (*Id.* at p. 483, at lines 17-21). [3]

[3] Indeed, Ms. Marbury proceeded with her informal consignment of the earrings and pendant to Mr. Shimanov despite her business manager Louis Bush's dislike of Mr. Shimanov and the fact he did not "get a good vibe about the situation" and told her to "watch out for that guy." (See Reply Aff. at Ex. "E" p. 346, lines 16-25 and p. 347, line 2).

However, based on *Grimberg* and *Sutro Brothers, supra,* none of these factors convert Mr. Shimanov's alleged post-delivery failure to return the jewelry, or pay Marbury for the jewelry, into a theft or larceny at the time of delivery. [4]

B. <u>The Evidence Has Shown Ms. Marbury Voluntarily Relinquished Possession of the Jewelry as Part of a Consignment.</u>

Discovery has demonstrated that Ms. Marbury handed her jewelry to Mr. Shimanov voluntarily so that he would sell the jewelry on her behalf. Plaintiff allegedly drove to the Diamond District wearing her yellow diamond earrings and pendant. While she was waiting in the car for Mr. Shimanov, Ms. Marbury alleges that she removed the jewelry from her person and placed them in a black Jacob & Company bag. She then handed the bag to Mr. Shimanov. *See* Moving Memorandum of Law at p. 4. Thus, it is clear that Plaintiff voluntarily relinquished control of her jewelry to Mr. Shimanov. Because the policy does not provide coverage for failed consignments, the Underwriting Defendants properly denied Plaintiff's claim.

Earlier this month, a New York court determined that a parting was voluntary even if induced by misrepresentations. In *Martin, Shudt, Wallace, DiLorenzo & Johnson v. The Travelers Indem. Co. of CT*, 2014 U.S. Dist. LEXIS 14323 (N.D.N.Y. Feb. 5, 2014), a customer of the insured tendered a forged check. *Id.* at *2. The insured, believing the check to be good deposited the check in the bank and wired the funds "to a third-party's bank account as instructed by the purported client." *Id.* at *3. An investigation revealed that the transaction "was an act of larceny." *Id.* at *3. The policy excluded losses resulting from "voluntary parting with any property" by the insured. *Id.* The insured argued that the exclusion did not apply, as the parting was only occasioned by a false representation, but the court held that the fact "[t]hat Plaintiff

[4] That Anthony Galizia of RMG Investigations concluded that he believed Mr. Shimanov did not return the jewelry to Ms. Marbury does not alter the fact, as also expressed by Mr. Galizia, that this loss was excluded under Exclusion B in the first place when Ms. Marbury consigned the jewelry to Mr. Shimanov. (See Exhibit "Q" attached to Chernow Affirm, in Support, at sub-exhibit 2, pages RMG00040-41.

wired the money in reliance on misrepresentations or false pretense does not alter the voluntariness of that parting." *Id.* at *7-8.

We note that Plaintiff has pointed to portions of Steven Burke and Andrew Deith's deposition transcripts in which they testified regarding certain hypothetical scenarios. (See Plaintiff's Aff. in Opp. at p. 11, para. 26). However, what Plaintiff did not point to was that Mr. Burke, Mr. Deith, and Helene Polycarpou, a claims adjuster at Navigators, testified that the investigation demonstrated Ms. Marbury voluntarily relinquished possession to Mr. Shimanov as part of a consignment, not a theft. Accordingly, each determined that no covered loss occurred. Mr. Burke testified as follows:

> Q. Could you specifically explain why you believe the claim wasn't covered by the policy?
> A. Our policy only covered loss in certain it would only cover loss, per Exclusion B, if the insured was wearing the jewelry, if the jewelry was in a safe, a bank safe or a hotel safe, or if the insured was carrying the jewelry on her person.
> Q. Was your determination based on the information contained in RMG's report?
> A. Yes. Yes.
> Q. Was it based solely on that information or did you have any other information that you reviewed?
> A. No. It was based solely on that information.
> Q. And why did you -- can you explain why, why you determined or agreed with the determination that the Exclusion B you just described meant that this claim was not covered by the policy?
> MR. CHERNOW: I object to the form of the question. Over objection, you can answer.
> THE WITNESS: Sorry. Could you repeat the question, please?
> BY MR. SHARP:
> Q. Could you explain factually why you determined that the claim wasn't covered under the provision that you referenced earlier?
> A. Because when Mrs. Marbury handed over the jewelry, it wasn't within the terms of Exclusion B, that-- it wasn't-- she wasn't wearing it, it wasn't close to her person or on her person and it wasn't in a safe.

(See Reply Aff. at Ex. "F," p. 41, line 1 through p. 42, line 6). Similarly, Ms. Polycarpou testified as follows:

> Q. In determining whether there was a covered loss, did you make a determination, I suppose as a threshold matter, of whether there had been a loss?
> A. Well, there was no covered loss under the policy wording because the goods had been consigned to a third party. The jewelry had been consigned to a third party, therefore there was no coverage under the policy wording.
> Q. And how did you know that the jewelry had been consigned to a third party?
> MR. CHERNOW: Object to the form. You can answer.

THE WITNESS: Well, firstly, because Marbury said it had been, in her statement; secondly, she told the police the goods had been consigned to a third party and, by the way, the police report was in fact voided; and, thirdly, in the RMG report the adjustor, the investigator discovered that information from Marbury, from speaking to Marbury.

(See Reply Aff. at Ex. "G", p. 35, lines 4-22). Likewise, Mr. Deith testified as follows:

Q. Is there any other type of loss that could apply in a situation involving jewelry that an insured's unable to recover?
MR. CHERNOW: I object to the form of the question. You can answer.
THE WITNESS: Well, again, she voluntarily gave the goods to him. He didn't physically take them from her. And we come back to the Exclusion B allowance; once she passed the goods over to him, coverage ceased.

(See Reply Aff. at Ex. "H", p. 39, line 21 through p40, line 5). Accordingly, the Underwriting Defendants' denial of coverage for Plaintiff's loss was proper.

II. PLAINTIFF'S INTERPRETATION OF THE CONTRACT IS NOT REASONABLE.

For the first time, and against all logic, Plaintiff argues that Exclusion B does not exclude any losses from coverage, but provides those losses that occur under the circumstances set forth in paragraphs (i), (ii), and (iii) are insured up to the full value listed in the schedule and that those losses not implicating paragraphs (i), (ii), and (iii) are covered up to $750,000. In Plaintiff's world, Exclusion B is not an exclusion at all. This strained, post hoc interpretation of the Policy is not supported by the policy language and conflicts with what Plaintiff understood her coverage to be before she entered into the Policy.

A. Paragraphs (i), (ii), and (iii) of Exclusion B Are Subject To The $750,000 Sub-Limit.

Plaintiff's new reading of Exclusion B is illogical and ignores the basic principles of contract interpretation. As such, the fact that Plaintiff and the Underwriting Defendants have argued for different interpretations does not make the Policy ambiguous, and this Court should enforce the Policy according to its plain language.

It is well settled that an insurance policy "is not ambiguous 'merely because the parties urge different interpretations in the litigation. The court is not required to find the language ambiguous where the interpretation urged by one party would 'strain [] the contract language beyond its reasonable and ordinary meaning.'" *TLC Beatrice Int'l Holdings, Inc. et. al. v. CIGNA Ins. Co.*, 2000 U.S. Dist. LEXIS 2917 (S.D.N.Y. 2000). Moreover, the court should not "accord a policy a strained construction merely because that interpretation is possible." *Bretton v. Mutual of Omaha Ins. Co.*, 110 A.D. 2d 46, 49, (1985), *affd.,* 66 N.Y. 2d 1020 (1985). In short, "ambiguity in policy provisions should not be found where none in fact exists." *Utica Mut. Ins. Co. v. Mishkin & Barclay, Inc.,* 198 A.D. 2d 500, 501 (2d Dept. 1993) [citations omitted]. Moreover, the Court must look to the entire contract to discern the meaning of the language used and the intent of the parties. *Murray Oil Prods., Inc. v. Royal Exch. Assurance Co.*, 21 N.Y.2d 440 (1968).

For example, in *Arrowood Indem. Co. v. King*, 699 F.3d 735, 740 (2d Cir. 2012), the appellant insureds appealed the judgment of the District Court of Connecticut that granted summary judgment in favor of insurers that none of three liability insurance policies owned by the insureds covered their alleged liability to a third-party child who was injured by an all-terrain vehicle (ATV) owned by the insureds. Appellants argued that the policy was ambiguous with regard to any requirement that the ATV be listed in the policy's declarations page. To support this conclusion, Appellants pointed out that "the document identified as the declarations page (1) lacks blank lines on which to list ATVs and (2) includes language limiting its subject matter to 'off' premises use of ATVs, which . . . implies coverage of 'on' premises use of ATVs even if the ATV is not listed in the declarations." The court disagreed, noting that "even such tortured linguistic deconstruction cannot escape the obvious reality that there is no ambiguity in the policy language itself." *Id.* at 740.[5] In this regard, "[t]he umbrella policy specifically recites that

[5] While *Arrowood* was decided under Connecticut law, Connecticut's law on ambiguities is in accord with New York law.

the policy does not cover liabilities arising from the use of an ATV unless the ATV is 'described as being covered in the declarations.'" *Id.* It drew absolutely no distinction between "on" and "off" premises ATV use. The court went on to note:

> The two quibbles identified by the [Appellants] in the formatting and wording of the separate declarations page come nowhere near the showing that would be required to render the policy language ambiguous.

Id.

Here, the "Risk Details" in the Marbury Jewelry Policy provide that there are two Sums Insured under the policy. Sum Insured No. 1 provides as follows:

> 1. USD 2,494,831 any one loss in respect of scheduled Jewellery kept within a Safe Deposit Box located at:
>
>   Bank of America
>   433 Boston Post Road
>   Port Chester, NY 10573

(See Chernow Aff. at Ex. "L"). Sum Insured No. 1 is only implicated where the loss occurs while the Jewelry is within the Bank of America Safe Deposit Box located in Port Chester ("BOA Safe Deposit Box"). If the loss occurs while the insured property is deposited in some other bank, Sum Insured No. 2, not Sum Insured No. 1, applies:

> 2. Sub-limit for Exclusion B of $750,000 any one loss.

In turn, Exclusion B sets forth:

> **EXCLUSIONS**
> This ***insurance does not cover***:
> ***
> B. Loss or damage to jewelry or watches unless such items are:
> (i) being worn or
> (ii) being carried by hand under the personal supervision of the insured or
> (iii) deposited in a bank or locked safe, unless the insured is staying at a hotel or motel when such items are kept in the principal safe of the hotel or motel.

(*Id.*, Emphasis added). Thus, if the insured decides to remove her insured jewelry from the BOA Safe Deposit Box, any loss is excluded from coverage, unless the loss fits within paragraphs (i), (ii), or (iii) set forth above. If the loss does fit within paragraphs (i), (ii), or (iii), the Policy provides coverage up to $750,000.

Plaintiff seeks to read out the exclusionary language from Exclusion B, completely ignoring the fact that the exclusion begins with "this insurance ***does not cover***." Plaintiff's strained interpretation hinges on its flawed reading of Exclusion B paragraph (iii). Because paragraph (iii) refers to jewelry "deposited in a bank," Plaintiff argues that the policy provides coverage up to the full stated value of the jewelry of $2,494,831 – and is not subject to the $750,000 sub-limit – for losses under (iii). (Plaintiff's Aff. in Opp. at para. 15).

However, as discussed above, Sum Insured No. 1 and Sum Insured No. 2 are entirely separate coverages. The language "deposited in a bank" in Exclusion B, paragraph (iii) does not refer to the BOA Safe Deposit Box, and thus there is no ambiguity. By way of example, if the insured decided to remove her insured jewelry from the BOA Safe Deposit Box to go to the Bahamas,[6] she would have $750,000 of coverage if she placed her jewelry in the principal safe of a hotel or motel. She would have no coverage if she kept the items within the in-room hotel safe. Alternatively, if she was not staying in a hotel or motel, she could either deposit the jewelry in a locked safe or in another bank and would be covered up to $750,000 for any losses.

That the policy has two Sums Insured is clear from its face, and the existence of Exclusion B, paragraph (iii) does not create an ambiguity. Plaintiff knew the policy had two limits: one for jewelry deposited in the BOA Safe Deposit Box, and one for jewelry outside of that Box, as long as she was wearing or carrying the jewelry, or storing it in another bank or locked safe. See Reply Aff. at Ex. "N," p. 289, line 25 and p. 290 2-14, where Mr. Evans testified that Ms. Galati of Aon told him that Ms. Marbury's jewelry would be covered for one maximum amount if lost, damaged or stolen while in the BOA Safe Deposit Box and for one maximum amount of $750,000 if the jewelry was not in this box. Further, Mr. Evans testified

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[6] At her first deposition in this action, Ms. Marbury testified she brought the yellow diamond pendant and earrings with her to the Bahamas on two occasions. (See Reply Aff. at Ex. "D," p. 44, lines 24-25 and pp. 45-46).

that he used the phrase "out of safe" with Ms. Marbury in the context or connection of "whether she was wearing it or holding it in her possession or --- yeah, or out of the safe." (*Id.*, at page 304, at lines 5-9.)

Accordingly, no ambiguity exists in any section of Exclusion B of the Policy. [7]

B. <u>Any Alleged Ambiguity Concerning Exclusion B, Paragraph (iii) Should Not Be Read To Expand Coverage, As Paragraph (iii) Does Not Apply To Plaintiff's Alleged Loss.</u>

Not only is Plaintiff's Policy interpretation unsupported by the policy language, but Plaintiff's argument is academic. Plaintiff has always contended that her loss occurred either while she was wearing or carrying the jewelry. Accordingly Exclusion B, paragraph (iii) does not apply to the instant dispute.

Generally, courts do not to entertain "red herring" ambiguities where the subject matter of the dispute does not relate to the provision asserted to be ambiguous. *See Blanar v. State Farm Ins. Cos.*, 34 A.D.3d 1333, 1334 (4th Dept. 2006) ["[c]ontrary to plaintiffs' contention, the fact

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[7] Plaintiff cites several cases to attempt to show that Exclusion B was ambiguous, but the cases cited are either inapposite or support the Underwriting Defendants' position. In *MDW Enters. v. CNA Ins. Co.*, 4 A.D.3d 338, 772 N.Y.S.2d 79 (2d Dept. 2004), unknown persons set fire to the insured premises while it was vacant and the issue was whether the loss was excluded under the vacancy provision. The insurer argued that arson was necessarily included in the definition of vandalism, while the insured asserted the terms were ambiguous. The court ultimately ruled in favor of the insured. However, there, arson was not listed as a basis for the vacancy exclusion (while vandalism was). Moreover, the court determined that the nature of vandalism was more minor than arson. The court looked at how the terms were used in different places of the policies and determined that the two terms were different. Here, this court should likewise find that the specific BOA Safe Deposit Box described in Sum Insured No. 1 of the policy, is different than the bank or locked safe, described in Sum Insured No. 2. In *Vassar v. Diamond State Ins. Co.*, 84 A.D.3d 942, 923 N.Y.S.2d 124 (2d. Dept. 2011), the court determined that the United Educators Umbrella Liability policy was excess rather than primary. There, the policy read that it would only provide coverage after exhaustion of the primary policy and "any other insurance available to the Insured." To find that the United Educators umbrella policy was primary to an umbrella policy issued by Diamond State and excess policy issued by Scottsdale, the court explained, it would have had to give no effect to the language "any other insurance." Here, like Diamond State and Scottsdale, Plaintiff is asking the court to ignore language in the policy that Exclusion B expressly states that this insurance "does not cover." This Court should not render this key language meaningless. *In the Matter of Nationwide Mut. Ins. Co. v. Davis,* 195 A.D. 2d 561, 600 N.Y.S. 2d 482 (2d Dept. 1993), dealt with underinsured motorist coverage where the policy face sheet did not indicate that the coverage limit would be subject to a deduction. This is not the case here, where the Sum Insured No. 2 of $750,000 for Exclusion B appears directly below the larger Sum Insured No. 1 for the BOA Safe Deposit Box. Indeed, as a scheduled jewelry policy, the Marbury Policy did not even have a deductible.

that the policy contains a different limitations period with respect to third-party coverage does not create an ambiguity that would have the effect of extending the limitations period with respect to first-party coverage."); *Arkin-Medo Corp. v. St. Paul Fire & Marine Ins. Co.*, 585 F. Supp. 11, 13 (E.D.N.Y. 1982); [court did not hear argument as to alleged ambiguity between different limitation periods in burglary versus employee infidelity provisions of the policy, since the underlying dispute did not concern the so-called ambiguity as plaintiffs' complaint alleged that the loss was due to burglary and the question was whether suit was timely filed.].

Here, it is clear that Ms. Marbury's jewelry was not in ***any*** bank or locked safe at the time of the alleged loss, and thus Exclusion B, paragraph (iii) is not relevant to the alleged loss. Accordingly, Exclusion B, paragraph (iii) should not be read to create an ambiguity.

In any event, the Policy provides that "9…[A]ny part of this insurance found by any court to be unenforceable will be considered capable of being removed so as not in any way to affect the remainder." (See Chernow Aff. at Exhibit "L", at RMG000085).

C. Any Ambiguity in Exclusion B, Paragraph (iii) Should Not Be Read in Favor of Coverage, As the Evidence Demonstrates that Plaintiff's Agent Drafted the Relevant Language.

Even if the Court finds an ambiguity in Paragraph (iii), the evidence demonstrates Aon, Marbury's insurance broker, drafted the Risk Details and policy exclusions. Thus, the general rule of policy interpretation that ambiguities are interpreted against the insurer and in favor of coverage does not apply.

It has been held that if the insured played a role in drafting the policy, the court may not be obligated to resolve any arguable ambiguity in favor of coverage under the doctrine of *contra proferentum*, particularly when the insured is sophisticated entity. *See Morgan Stanley Group,* *Inc. v. New Eng. Ins. Co.*, 225 F.3d 270 (2d Cir. 2000). In fact, New York courts will read ambiguities ***against*** the insured if the insured drafted the ambiguous provision.

For example, in *Metpath, Inc. v. Birmingham Fire Ins. Co. of P.A.*, 86 A.D.2d 407, 412-13 (1st Dept. 1982), the insured hired insurance broker Johnson & Higgins to place an insurance policy for Metpath, Inc. While the court found that the policy language was unambiguous, it noted that "if the policy language is considered ambiguous or open to doubt, any ambiguity or doubt must be resolved against Metpath and in favor of Birmingham since the drafter of the insurance policy was Metpath's agent, J&H…"*Id.*

Here, Steven Burke testified that while he did not know for certain, he believed the policy "wording would have been drafted by the broker." (See Reply Aff. at "Ex." F, p. 107, line 10 through p. 108, line 4). Further, Helene Polycarpou testified that certain wordings of the policy at issue were standard market wordings, and that any other wordings would have to have been drafted by Aon as broker of the assured:

> Q. So the language of the policy was drafted by the agent of the insured?
> MR. CHERNOW: I object to the form of the question. You can answer.
> THE WITNESS: Some parts of the policy would have been, if they were not market form standard wordings.

(See Reply Aff. at Ex. "G," p. 31, line 24 through p. 34, line 21). Ms. Polycarpou was asked to identify the standard market wording in the slip and explained that reference numbers indicate whether clauses and endorsements are standard market language. She testified as to all of the clauses and endorsements that were standard market wording. She also testified that the remaining provisions in the policy do not contain a note that they are "market language" and thus "may be Aon language." (*Id.*, at p. 79, lines 7-25, pp. 80-82 and p. 83, lines 2-7). Significantly, the page of the Policy containing Exclusion B does not contain reference numbers (see Chernow Aff. at Ex. "L," pages RMG000072-73 and 83).

Therefore, the only permissible inference that can be drawn is that Exclusion B was drafted by Aon Ltd., Ms. Marbury's insurance broker. As a matter of New York law, an insurance broker is considered the agent of the insured, N.Y. INS. LAW § 2101(c) (2013), *Bohlinger v Zanger*, 306 N.Y. 228, 231, 117 N.E.2d 338 (1954), and Ms. Galati of Aon testified that she understood this and that Paul Carr of Aon, Ltd. sent her the policy wordings on multiple occasions. (See Reply Aff. Ex. "L," p. 133, lines 18-21, and p. 148, line 20 to p. 149, line 5).

Furthermore, Ms. Marbury was a sophisticated individual who was assisted in the brokering process for the Policy by her business manager Louis Bush and her financial advisor/stockbroker at Merrill Lynch, Daniel Evans. (See Reply Aff. at "Ex." D, p. 12, lines 6-20). As Mr. Evans testified, at the time he began to look into obtaining insurance for the Marburys in 2010, they had $14 million invested with Merrill Lynch, and in November 2010 at the time Mr. Evans was already dealing with Ms. Galati, the Marburys had "a sizeable portfolio generating income." (See Reply Aff. at Ex. "J," p. 19, lines 22-24 and p. 36, lines 8-12).

As such, to the extent that this Court determines that an ambiguity exists in Exclusion B, this ambiguity should be construed against Plaintiff, as Plaintiff's broker drafted the relevant language and Plaintiff was a sophisticated individual with the bargaining power to seek the most favorable coverage.

D. <u>There is no Ambiguity Concerning the Lack of Named Locations or Territorial Limits in the Schedule.</u>

In yet another angle by Plaintiff, the claim is made that because the "Marbury Jewelry Schedule" does not refer to "named location(s)" or "territorial limits," that it is ambiguous. (Plaintiff Aff. in Opp. at para. 19.). However, this is another red herring. As the Marbury policy makes clear, it is a "scheduled" policy:

<u>RISK DETAILS</u>

INTEREST: Jewellery as per schedule of items held on file with Aon Limited.

(See Chernow Aff. at Ex. "L," at RMG000072).

Therefore, it is of no moment that the "Schedule' did not refer to the 'named locations' or 'territorial limits.' The Policy clearly insured two different sums, No. 1 at the BOA Safe Deposit Box and No. 2 for Exclusion B of $750,000, and it is no coincidence that the total on the schedule of $2,494,831 is the same as Sum Insured No. 1. In construing scheduled policies, courts have made clear that values and locations can be incorporated by reference. *See Knowlton Specialty Papers, Inc. v. Royal Surplus Lines Ins. Co.*, 112 Fed. Appx. 121 (2d Cir. 2004). *See also William H. McDermott v. Great Am. Alliance Ins. Co.*, 2005 U.S. Dist. LEXIS 44914, 11-12 (N.D.N.Y. 2005); [where the plaintiff insured alleged he was entitled to recover higher limits applicable for newly acquired property which was not at a "described premises" and the declaration page did not specifically describe the location of the insured property, the court held there was no ambiguity as the declarations page of the policy specified the property by referring to the Statement of Values, and even if it was assumed that the Statement of Values was not on file within the meaning of the policy's declarations page, this would not "transform the…property into property 'not at a described premise..'"]. Even in *Richner Communications, Inc. v. Tower Ins. Co. of New York, Inc.*, 72 A.D. 3d 670, 898 N.Y.S. 2d 615 (2d Dept. 2010), cited by Plaintiff, the Court held that the policy was not rendered ambiguous by a provision that stated the insurance applied to bodily injury "in the coverage territory." *Id.*, at 671-72.[8]

E. <u>Plaintiff's Interpretation of Exclusion B Conflicts With Plaintiff's Understanding of the Policy at the Time the Policy Incepted and After the Alleged Loss Transpired.</u>

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[8] Moreover, even if Plaintiff's argument had any merit, it would not be a basis to declare the policy ambiguous. *See Blanar and Arkin-Medo, supra.* The Underwriting Defendants do not contend that Ms. Marbury could not travel with the jewelry. Ms. Marbury could do so – indeed, the Risk Details refer to the Situation of the Policy as "worldwide" – but she would be subject to a sub-limit of $750,000 for Exclusion B. (See Chernow Aff. at Ex. "L" *supra*, at RMG000072).

Plaintiff's other new argument that the $2,494,831 coverage for Sum Insured No. 1 in the BOA Safe Deposit Box applies to its loss rather than the $750,000 sub-limit for Exclusion B, is contradicted by the fact that Plaintiff fully understood the $750,000 sub-limit would apply before and after the Policy incepted. [9]

Before the Policy incepted, Plaintiff understood the most she could recover for losses that occurred outside the BOA Safe Deposit Box was $750,000. As Plaintiff alleged in her Second Amended Complaint:

> 20. In or about November of 2010, Plaintiff was told, among other things, that under the proposed insurance policy, if her jewelry was stolen or damaged when it was "out of safe" that she would recover $750,000 per loss.

(See Chernow Aff. at Ex. "A," page 4).

Further, after the alleged loss, the Plaintiff understood that the $750,000 sub-limit was the maximum she could recover as well. (See Chernow Aff. at Ex. "N," at AON 02218, wherein Plaintiff's counsel emailed Ms. Galati on August 18, 2011 to explain their position that the sub-limit exclusion at page 2 of the policy only limited the exclusion at page 8 of the policy to $750,000 for losses that fell outside the exclusion.) (See also Reply Aff. at Ex. "B," Bates Stamp page 000002, where Plaintiff's counsel expressed confidence that they would be able to settle the claim "if we are able to file a comprehensive complaint advancing our position as to our entitlement to receive the 750K sublimit under the policy").

Moreover, Ms. Galati, the broker at Aon who worked on placing the Policy at issue, testified that she explained to Ms. Marbury's representatives that she could not take more than

[9] Courts have traditionally upheld sub-limits where the insured's claim was clearly subject to the sub-limit. *See Camico Mut. Ins. Co. v. Heffler, Radetich & Saitta, LLP*, 2013 U.S. Dist. LEXIS 91649 (U.S. Dist. E.D. Pa.); [court refused to treat misappropriation sub-limit in the amount of $100,000 as surplusage despite allegations of ambiguity]. By contrast, only where a policy does not specify or refer to any exclusions or sub-limits will the insurer be forced to make full coverage available. *Hernan Santa Jr. et. al. v. Capitol Special Ins. Co., Ltd.*, 33 Misc. 3d 1218(A), 941 N.Y.S. 2d 541 (Sup. Ct. NY Cty. 2011).

$750,000 out of the BOA Safe Deposit Box. (See Reply Aff. at Ex. "L," p 83, lines 8-11). If Ms. Marbury was to take out more, she would need to tell Ms. Galati so that Aon could inform the "insurance company so we could ensure adequate coverage." (*Id.*, at p. 114, line 20 through p. 115, line 2). This was because "the out of safe/wearing limit caps the amount of the value of items out of the safe at any one time at $750,000." (Id., at page 114, lines 20-22).

Thus, at the time the Policy incepted, Plaintiff was aware of the $750,000 sub-limit, which had been fully negotiated and disclosed, and that the sub-limit was a basis for the calculation of the policy premium. (See, generally, Ex. "K" to Chernow Aff. and see Ex. M attached to Reply Aff. at p. 213, lines 7-25, pp. 214-216, and p. 217, lines 2-14).

In addition, Aon's Quote Disclosure Report provided the following coverage limits (see Reply Aff. at Ex. "A."):

Policy	Coverage Limits Lloyds of London
Personal Jewelry Collection	$2,494,831 Scheduled In Vault Jewelry Sublimit of $750,000 Out of Vault

Plaintiff signed this report on May 20, 2011, three days before the policy incepted, thereby "consent[ing] to the terms noted, including Aon's compensation, and instruct[ing] Aon to place coverage I have selected."

F. <u>The Payment of Claims Condition in the Policy Does Not Abrogate the Schedule of Values, Policy Limits or the Basis of Settlement.</u>

Again, notwithstanding Plaintiff's acknowledgment before January 31, 2014 that the maximum available coverage under Exclusion B is $750,000, Plaintiff now claims that the "Payment of Claims" Policy condition, which is in another Aon drafted form, entitles Marbury to $892,700, which is the scheduled value of the jewelry items consigned to Mr. Shimanov, or their increased value as they are allegedly part of a pair or set.

Plaintiff's argument is at least consistent in its misapprehension of the Policy. Pursuant to Sum Insured No. 1, the only way Plaintiff could obtain $892,700 from the Underwriting Defendants for the items at issue in this action was if Mr. Shimanov had stolen them from the BOA Safe Deposit Box. As there is no issue of material fact that Ms. Marbury instead gave these two items to Mr. Shimanov in front of his office building, if the Court were to construe Sum Insured No. 2 as granting coverage here, or find that Ms. Marbury did act within one or both of the first two exceptions of Exclusion B, (i) and (ii), Ms. Marbury's maximum recovery would be $750,000. Plaintiff's argument also conveniently ignores the second sentence of the pertinent Basis of Settlement condition, as well as sub-section C, that clearly would limit any recovery under Sum Insured No. 1 to the scheduled value of the jewelry items:

> **BASIS OF SETTLEMENT**
>
> A. the basis of settlement will be:
> (i) for items individually listed, the value agreed by the underwriters and shown in the Schedule. The underwriters will not be liable for more than the agreed value;
>
> ....
>
> C. In no event will the Underwriters be liable for more than the applicable limits of liability shown in the Schedule.

(See Ex. "L" to Chernow Aff., at RMG 000083). [10]

G. <u>Extrinsic Evidence Supports the Underwriting Defendants' interpretation of the Policy.</u>

Even if the court determines that Exclusion B is potentially ambiguous, the extrinsic evidence overwhelmingly supports the Underwriting Defendants' interpretation of the Policy. The Underwriting Defendants did not know that Ms. Marbury would be relinquishing possession

[10] Whether or not the "Payment of Claims" condition of the Policy would pay increased value for any "pair or set" is also academic and premature. There has been no threshold determination that Ms. Marbury's alleged loss is even covered under the Policy. The 'Payment of Claims' condition only comes into effect if "the insured complies with all requirements in the following conditions." There are eight other conditions, including the "Due Diligence" condition (id., at RMG00084) which is the subject of the Underwriting Defendants' Sixth Affirmative Defense to Plaintiff's Second Amended Complaint (see Exhibit "B" to Chernow Aff. in Support, at paras. 8-9, page 16).Ms. Marbury can hardly prove compliance with the Policy's Due Diligence condition, as she admittedly failed to "do anything to monitor Shimanov's activities in trying to sell the pendant and the earrings" for her. (See Reply Aff. at Ex. "G," p. 414, lines 3-6.

of any of her insured jewelry to a third party, and it is clear that Ms. Marbury understood that a $750,000 sub-limit would apply to any losses that occurred while the jewelry was out of the BOA Safe Deposit Box.

While the existence of an ambiguity cannot be decided by reference to extrinsic evidence, "[o]nce a court concludes that an insurance provision is ambiguous, the court may accept any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract." *N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102, 114 (2d Cir. 2010). Summary judgment is appropriate, even when a court must resort to extrinsic evidence to determine the parties' intent, where the extrinsic evidence is one-sided or where "there is no extrinsic evidence that would support a resolution of the ambiguities in favor of the nonmoving party's case." *N.Y. Marine & Gen. Ins. Co., supra,* at 114 (citations omitted).

Here, the extrinsic evidence reflects that the Underwriting Defendants did not intend to insure jewelry that was given to a third-party as part of a consignment. Shelli Galati testified that she never told Paul Carr, Aon Ltd.'s representative in London who was communicating with the Underwriting Defendants, that Ms. Marbury intended to sell the yellow diamond earrings and pendant and that "I didn't' know [as of May 18, 2011] that the items were out to sell, to be clear." (See Reply Aff. at Ex. "M," p. 225, lines 15- 20). Moreover, Ms. Galati testified that she agreed that the only impression Aon Ltd. in London had was that Ms. Marbury would either keep the earrings and the pendant in the vault or wear them. (See *id.* at p. 228, lines 8-13). She further testified that she never discussed consignment with Mr. Evans or Mr. Bush before the policy incepted (See *id.* at p. 271, line 21, through p. 272, line 10) and that it was never "indicated to me from Bush or Evans that by selling the pieces they would be relinquishing possession of the pieces." (See *id.* at p. 323, lines 19-21.)

Accordingly, even if this Court determines that Exclusion B is potentially ambiguous, extrinsic evidence supports the Underwriting Defendants' interpretation of the exclusion.

III. PLAINTIFF'S ALLEGATION THAT SHE NEVER RECEIVED A COPY OF THE POLICY DOES NOT IMPACT COVERAGE.

In paragraph 5 of Plaintiff's Affirmation in Opposition, Plaintiff asserts that Ms. Marbury was not given a copy of the Policy. While Plaintiff herself may not have received a copy of the Policy, Aon did receive a copy of indications with slip wording identical to the Policy on May 19, 2011 from its London affiliate, Aon Ltd., and the slip itself on May 23, 2011 from Aon Ltd. Since Aon's knowledge is imputed to its insured, Ms. Marbury effectively had knowledge of the Policy's terms and conditions at the time the Policy incepted.

In *Core-Mark Int'l Corp. v. Commonwealth Ins. Co.*, 2006 U.S. Dist. LEXIS 61338 (S.D.N.Y. Aug. 30, 2006), the insured retained Aon to purchase property insurance. *Id.* at *2. Aon secured a policy with Commonwealth, and received a complete copy of the policy, which included an Occurrence Limit of Liability Endorsement ("OLLE"). *Id.* at *3. While Aon sent its insured the Binder, Aon failed to provide its insured with a copy of the OLLE before the date of loss. The coverage determination hinged on the OLLE, and Core-Mark argued that as it was not provided a copy of the relevant provision, it was thus unaware of the provision. The court found that this was of no consequence, as Commonwealth had provided a copy of the relevant provision to Aon. The court explained "Because New York law imputes the knowledge of an insurance broker to the insured, Core-Mark had constructive knowledge of the OLLE well in advance of the fire." *Id.* at *13 n.2. *Accord, Two Farms, Inc. v. Greenwich Ins. Co.*, 2014 U.S. Dist. LEXIS 1629, at 28 (S.D.N.Y.) [brokers' knowledge of sublimit at time of policy negotiation properly imputed to insured]. *See also Ribacoff v. Chubb Group of Ins. Cos.*, 2

A.D.3d 153, 154-55 (1st Dept. 2003) (Insured "is bound, as principal, by notice to or knowledge acquired by the agent") (citations omitted).

Here, it is undisputed that Shelli Galati received a copy of the indications with slip wording from Paul Carr of Aon, Ltd., on May 19, 2011, five days before the policy incepted, and the slip agreed to by the Underwriters on May 23, 2011 (See Reply Aff. at Ex. "L," at p. 150, lines 15-25, p. 151 and p. 152, lines 2-3, and Reply Aff. at Ex. "M," p. 277, lines 7-24, Chernow Aff. in Support at Ex. "I" at AON 01018 and AON 01023 through 01039, and Reply Aff. at Ex. "C"). Further, the Exclusion B listed in the Indications was identical to the Exclusion B listed in the Policy. (See Reply Aff. at Ex. "L" at p. 151, lines 23-25 and p. 152, lines 2-3, Chernow Aff. in Support at Ex. "I" at AON 01034, and the policy attached to Ex. "A," at, page 8 of 13).[11]

Moreover, while Ms. Galati testified she sent Ms. Marbury a copy of the Policy on June 14, 2011 (see Reply Aff. at Ex. "L," p. 152, lines 17-25), this transmittal does not matter for the purposes of determining coverage as Aon's knowledge is imputed to Ms. Marbury. *Core-Mark, supra*. In any event, physical delivery and possession of an insurance policy is not generally required to complete an insurance contract in the State of New York, *Maurice v. Allstate Ins. Co.*, 173 A.D. 2d 998, 667 N.Y.S. 2d 551 (2d Dept. 1991), nor is actual or manual delivery always required, *Ruiz v. State Wide Insulation and Constr. Corp.*, 269 A.D. 2d 518, 703 N.Y.S. 2d 257 (2d Dept. 2000). Indeed, Ms. Marbury acknowledged that the slip sent to Aon on May 23, 2011 contained Exclusion B and that at the time she gave the jewelry to Mr. Shimanov on May 24, 2011, the Policy was in full force and effect. (See Reply Aff. at Ex. "E," p. 385, lines 19-25, pp. 386-388 and p. 389, lines 2-8).

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[11] Ms. Galati also made clear that she did not communicate directly with the Underwriting Defendants but rather communicated with Aon in London, which obtained all information about the intended placement of the Marbury policy from her. (See Reply Aff. at Ex. "M," p. 227, lines 2-21).

IV. PLAINTIFF BREACHED THE SAFE DEPOSIT BOX WARRANTY.

Plaintiff fails to cite any case law supporting its position that the Policy contains no warranty about a safe deposit box and has not even attempted to allege that Ms. Marbury placed her insured jewelry in the BOA Safe Deposit Box before the Policy incepted.

While the policy requirement that Plaintiff must store her jewelry in the BOA Safe Deposit Box is not labeled as a "warranty" as such, historically a warranty to use "locks" has been enforced and not regarded as mere "description[s] of equipment" even if they were not called a 'warranty.' *Franklin State Bank v. Maryland Cas. Co. et. al,* 256 F. Supp. 356, 361-362 (5th Cir. 1919). New York courts also have enforced warranties in the absence of such labels:

> The protective safeguard provision is a warranty as defined by Insurance Law § 3106 (a). Similar safety provisions have been found by the First and Second Departments to be warranties under Insurance Law section § 3106 *(see Anjay Corp. v. Those Certain Underwriters at Lloyd's of London Subscribing to Certificate No. HN01AAF4393*, 33 AD3d 323, 822 NYS2d 249 [1st Dept 2006] [requiring video cameras at a jewelry store held to be a warranty within the meaning of Insurance Law § 3106]; *730 J & J, LLC v. Twin City Fire Ins. Co.*, 293 AD2d 519, 740 NYS2d 119 [2d Dept. 2002] [requiring the premises to be locked and secured held a warranty under Insurance Law § 3106]; *M. Fabrikant & Sons v. Overton & Co. Customs Brokers*, 209 AD2d 206, 618 NYS2d 294 [1st Dept 1994] [requiring an armored vehicle to be occupied with an armed guard locked inside whenever insured property was in the vehicle during a delivery was a warranty under Insurance Law § 3106]).

Nunez v. U.S. Underwriters Ins. Co., 31 Misc. 3d 418, 421 (Sup. Ct. Queens Cty. 2011).

Further, the Underwriting Defendants have not waived the defense of Ms. Marbury's breach of the BOA Safe Deposit Box warranty. In the insurance context, New York law defines waiver as "a voluntary and intentional relinquishment of a known right." *Albert J. Schiff Assocs., Inc. v. Flack*, 51 N.Y.2d 692, 698, 435 N.Y.S.2d 972, 975, 417 N.E.2d 84 (1980). An insurer cannot be said to have relinquished its right to assert a defense if it is not aware of the facts underlying that defense. As the Court held in *Federated Dept. Stores, Inc. v. Twin City Fire Ins. Co.*, 28 A.D.3d 32, 36 (1st Dept. 2006), "an insurer should not be charged with the obligation to reserve its rights against unknown policy defenses." Here, Aon represented to the Underwriting

Defendants that "the Marbury's are placing all of their jewelry in a bank vault" (See Chernow Aff. at Ex. "I," at page AON 01020), and thus the Underwriting Defendants did not have the knowledge to deny coverage based on Ms. Marbury's failure to place the items in the bank vault.

Further, courts have held that an insurer does not waive other defenses if it expressly reserves its right to assert them in the future. *Raniolo v Travelers Indem. Co.*, 279 A.D.2d 514, 718 N.Y.S.2d 884 (2d Dept. 2001). Here, the denial letter specifically reserved the Underwriting Defendants' right to deny coverage on other grounds:

> Underwriters further reserve their rights under the policy and applicable law to assert additional bases for non-liability as may be appropriate. The foregoing disclaimer is premised upon information known to Underwriters and the terms and conditions of the policy. By limiting policy references to those cited, Underwriters does [sic] not waive any other policy provision.

(See Chernow Aff. in Support at Ex. "Q," p. RMG000095).

Accordingly, the Underwriting Defendants properly preserved the breach of warranty defense and Plaintiff's Second Amended Complaint should be dismissed for failure to comply with the warranty in the Policy to keep her jewelry in the BOA Safe Deposit Box.

V. THE UNSOURCED PORTIONS OF THE AFFIRMATION IN OPPOSITION SHOULD BE IGNORED.

In support of its opposition to the Underwriting Defendants' motion for summary judgment and demand for summary judgment to be awarded to Marbury pursuant to C.P.L.R. 3212(b), Plaintiff has only submitted an attorney affirmation attaching the policy at issue and small portions of deposition transcripts, and failed to attach any documentary evidence supporting many of its factual claims. To the extent the affirmation relies on such un-sourced facts and assertions, it should be ignored by the court.

C.P.L.R. 3212(b) requires that a motion for summary judgment must be supported by, among other things, an affidavit "by a person having knowledge of the facts." Courts have held that attorney affirmations are of no probative value and insufficient to raise a question of fact if the attorney has no personal knowledge of the underlying transaction. *See Falkowitz v. Peters*, 294 A.D.2d 330, 331 (2d Dept. 2002). To the extent that the affirmation of an attorney "contains factual assertions not based on personal knowledge and otherwise unsupported by evidence . . . such affirmation, like any affirmation or affidavit of any person not based on personal knowledge, is without evidentiary value." *Krzywinska v. J&J Hotel Co. LLC*, 2014 N.Y. Misc. LEXIS 538, *12 (Sup. Ct. New York Cty.) (internal quotes and citations omitted). On the other hand, an affirmation of counsel which is based upon annexed documentary evidence will be considered by the court, *see Weingarten v. Marcus*, 118 A.D.2d 640, 641 (2d Dept. 1986).

In *Banc of Am. Leasing & Capital, LLC v. Compumed Billing Solutions Ltd.*, 2011 N.Y. Misc. LEXIS 4426 (Sup. Ct. Nassau Cty.), in opposition to the plaintiff's summary judgment motion, defendant elected to submit only an affirmation of its attorney wherein counsel asked the Court to search the record pursuant to CPLR 3212(b) and dismiss the complaint. The court reviewed this and found that "there is no representation made in the Affirmation that the attorney has any personal knowledge of the relevant facts herein. Therefore, this Affirmation is without evidentiary value." *Id.*, at *5. The court further noted that "[t]he attorney for defendant has not submitted any admissible evidence to rebut the plaintiff's prima facie showing of entitlement to judgment as a matter of law." *Id.*

Mr. Sharp's Affirmation in Opposition and demand for summary judgment pursuant to CPLR 3212(b) makes a number of factual assertions without providing documentary support. He attaches no documents to support allegations concerning Ms. Marbury's alleged compliance with policy conditions (Paragraph 5) and her interactions with Mr. Shimanov (Paragraphs 7, 8, 26). He also attaches no documents to support allegations that Mr. Shimanov induced Ms. Marbury to relinquish possession of the jewelry by trick or false pretense, or that he stole the jewelry. These assertions are the foundation to Plaintiff's claim that Ms. Marbury's alleged loss was covered by the Policy, but by not attaching supportive documentary evidence in admissible form to Mr. Sharp's Affirmation, Plaintiff has failed to raise any issues of material fact in opposition to the Underwriting Defendants' motion for summary judgment and has failed to establish a basis for finding for summary judgment for Ms. Marbury. Nor is this a case where summary judgment could be granted to Plaintiff, since, unlike in *Grimaldi v. Pagan,* 135 A.D. 2d 496 (2d Dept. 1987), the Underwriting Defendants have plainly alleged defenses in their "favor." *Id.*

CONCLUSION

It is respectfully requested that this Court grant summary judgment in favor or the Underwriting Defendants and dismiss Plaintiff's First and Fourth Causes of Action against the Underwriting Defendants, and deny Plaintiff's request to search the record and grant summary judgment in its favor.

Date: February 19, 2014
New York, New York

Respectfully Submitted,

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